

1617522 (Migration) [2019] AATA 1756 (10 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1617522

MEMBER: Rosa Gagliardi

DATE: 10 January 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A.

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• Statement made on 10 January 2019 at 3:47pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) — evidence that parties in a genuine and continuing de facto relationship – joint assets – joint household duties – companionship and emotional support – mutual commitment exclusive of others – registered relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994 (Cth), rr 1.09, 2.03A, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 27 February 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because there was insufficient evidence to demonstrate that the parties were in a genuine and continuing de facto relationship as defined by s.5CB of the Act.
4. The applicant appeared before the Tribunal on 10 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from his sponsor, Mr [A]. In addition, the Tribunal also took evidence from Mr [B], a friend of the parties.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

Whether the parties are in a spouse or de facto relationship

7. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

8. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
9. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters

contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

10. Background

11. The parties met [in] June 2013. The applicant came to Australia as a student in March 2013 and he has completed his studies. The applicant stated that this was his first relationship. The applicant gave realistic evidence about how he came to have an awareness of his homosexuality. The applicant was [a certain age] when he came to Australia and he had had no experience of anything in life. When he arrived in Australia he was feeling very vulnerable and the sponsor was very affectionate towards him and their relationship developed. In Pakistan he felt repressed. Being from a strict cultural background he has not been able to tell his parents about his relationship with the sponsor. He was concerned about the effect on their health if he told them, particularly as his mother has had a [medical incident].
12. The applicant stated that his sponsor similarly was not on friendly terms with his family, even though he had siblings in Australia. This was because he was different and he was openly homosexual and they did not accept this. His father had never been happy with him. The sponsor came to Australia [a number of] years ago from [Country 1] because of the civil difficulties in that country.
13. The applicant spoke at length about the background of the sponsor and his history. Including the fact that the sponsor had been married and that he had previously sponsored a partner to Australia in early 2000. They were together for many years but that person then met someone else in his work place. The sponsor had met the person in [Country 1].
14. The applicant stated that he had also applied for a [temporary] visa and that application was in the process of being assessed.
15. The applicant stated that the sponsor trusted him because his health was very fragile when they met and he suffered [medical incidents]. His health generally had been very poor as he did not have any support. The applicant discussed his role in caring for the sponsor in terms of his diet and assisting him to get to a point of general well-being. The applicant stated, however, that they provided mutual support to one another as the sponsor assisted him when he was going through difficulties with his studies. The applicant spoke realistically about how he had felt isolated in Australia and that the sponsor assisted the applicant overcome his sense of isolation.
16. The applicant stated that the sponsor [had medical condition 1], a condition he contracted while [working] . The applicant also gave credible evidence about how he came to terms with the sponsor's illness and the ramifications for their relationship. The applicant had been involved in the sponsor's care. The sponsor's [details deleted] was now normal but it was always a concern over the sponsor's health. The applicant stated that the sponsor was required to take medication for the rest of his life.
17. The applicant stated that he definitely did not get into the relationship for the sole purpose of gaining a migration outcome because he could have applied for a [temporary] visa in [2015] . If his relationship had been for the sole purpose of gaining a migration outcome, he could have done so much earlier.
18. The applicant stated that the house they were living in was now in both names. They had been living together in what was effectively the sponsor's house since their de facto relationship started [in] September 2013. The sponsor had wanted to gift the applicant a share ([percentage]) in the property.

19. The applicant stated that Centrelink was aware that the parties were in a relationship because the sponsor was receiving less now and they were required to pay some money back as they had not declared the relationship to Centrelink straight away. The Tribunal has sighted evidence of this.
20. The applicant stated that the parties have travelled all over Australia together. On his birthday in 2016 they went to [several different locations]. They also went to see their friend, [Mr B] (witness), who was living in [City 1] looking after his father at the time. The applicant stated that he considered it awkward to ask strangers to take photos of them together undertaking daily activities such as shopping and filling the car with petrol, but they did have photographic material on their trips away, for example. The Tribunal looked through the applicant's photographs on his phone that depicted their life together, including with their pets. The applicant stated that he did not post on [social media] because he was connected with his family members and he could not reveal the relationship to them.
21. The Tribunal asked the applicant to discuss the sponsor's [medical condition 2] and the applicant was able to spontaneously discuss that this illness was not something he had been born with. It had manifested itself later in his life. It commenced once the sponsor had found his ex-partner was involved with someone else.
22. The applicant stated that they had been good friends with their neighbour [Ms C] but she had moved. They had also travelled to see friends in [City 2] together. They also had a friend in [City 3] and stayed with her. She also visited [State 1] and her daughter and her ex-boyfriend stayed in their home.
23. Both the applicant and sponsor spoke about the joint care they had for their animals.
24. The sponsor at hearing noted that the application had been refused without either of the parties having attended an interview and he felt they were hard done by because they were a genuine couple. The sponsor confirmed that his [medical condition 2] was triggered by the end of his [relationship] with his former partner, probably because he had to contemplate living on his own as he was not a young man.
25. The sponsor was open about [having medical condition 1] due to a work accident.
26. The Tribunal found by parties particularly credible as they were both able to discuss each other's history and background in detail, consistently.

27. *The Financial aspects of the relationship*

28. The Tribunal accepts that the applicant is on the title of the sponsor's house which demonstrates to a significant degree that the parties have joint ownership of assets. The home belonged to the sponsor alone initially, but he had wanted to gift an interest ([percentage]) in the house to the applicant as a sign of his commitment to the relationship (Title sighted by Tribunal).
29. The Tribunal has also sighted a document demonstrating that the sponsor has giving the applicant enduring power of attorney in respect of his affairs.
30. The Tribunal has also sighted a joint bank account which they share for their everyday living. In terms of income for both parties, the sponsor receives Centrelink payments and the applicant is not working. He does, however, receive funds from his family who have properties and own a [factory]. Other than the home they share, the parties do not have other extensive income.

31. In addition, the parties have provided evidence that they both share the same credit card. The transactions also reflect costs for groceries, internet and travel.
32. Mr [B] gave persuasive evidence that the parties support one another financially and that this was reflective of their general support and commitment to one another.

33. *The nature of the household*

34. The parties gave credible evidence about sharing their home with their pets and taking joint responsibility for these. At hearing the sponsor also discussed the assistance provided to him by the applicant in terms of assisting him maintain his well-being. The Tribunal also accepts the parties' consistent evidence that they were essentially home bodies.
35. The utility accounts in joint names and in the name of the sponsor demonstrate that the parties have been living together consistently since [September] 2013.
36. The Tribunal notes that at the time of application the delegate noted that he/she had considered the correspondence, utilities, letters from [Organisation 1] and car registration certificate, letters from [Organisation 2], Centrelink, addressed both jointly and separately, but little weight was placed on this evidence because at the time it was considered that the evidence overall showing that the parties were in a genuine and continuing de facto relationship was limited. The Tribunal now has the benefit of further credible evidence that has persuaded it that the parties are in a genuine and continuing relationship and have been so for a lengthy period now; over five years.
37. The parties have also signed a Relationship Certificate in the State [1] [in] April 2015, meaning that they have also been in the relationship officially for a lengthy period.

38. *Social aspects of the relationship*

39. The Tribunal accepts the parties' statements that in particular the applicant, due to his religious and cultural background, has not been able to be open with his family about being in a same sex relationship. He gave credible evidence that he had diverted attention from his marital status by saying to his family that he was interested in continuing his studies and undertaking a Master's Degree in Australia, telling them he was not inclined to marry at this time, in the face of pressure in this regard from his family.
40. The Tribunal sighted photographic material that the applicant showed the Tribunal spontaneously on his phone during the hearing of the joint travel that the parties had undertaken, which included visiting friends across Australia.
41. Evidence of greeting cards having been sent to both parties has also been submitted.
42. Several statements have been submitted to show that in Australia at least (as opposed to Pakistan) the relationship is recognised as being a genuine and continuing one. Ms [D] provided evidence by way of a Form 888 stating that she had stayed with the parties in [State 1] on a visit, and that they also stayed with her. She also relates that the sponsor's well-being has improved since the relationship and that, in particular, his [medical condition 2] is now under control. Ms [D] also refers to the support and care the parties provide one another.
43. The Tribunal also found that Mr [B's] evidence in respect of how he viewed the relationship as particularly credible. He has also submitted a Form 888 confirming he has witnessed the care the parties provide one another with, and how they support one another in their household duties.

44. The Tribunal notes that the delegate had concerns that the parties had had separate travel on occasions. The parties gave persuasive evidence at hearing, however, that when the sponsor had been away for brief periods to [Country 1] (on two occasions) and to the [Country 2] on another, the applicant due to his study commitments had agreed to stay home to look after their numerous pets. The sponsor, the applicant and Mr [B] gave consistent evidence also, that the sponsor had travelled to the [Country 2] with Mr [B] on one occasion, as Mr [B] was going to meet his partner in that country, but needed to be accompanied as he did not travel well on his own.

45. There were also concerns that there was no evidence that the parties had declared their relationship to Centrelink at the time of application. Evidence has now been submitted to show that prior to the Department making its decision (and referring to this matter) the sponsor had delayed declaring the relationship to Centrelink. The Tribunal has sighted a letter to the sponsor, dated [in] April 2015, stating:

46. As you were a member of a couple [in] September 2013 you were entitled to the partnered rate of payment of [from] [SEP] 2013 to [JAN] 2015. You have, therefore, been overpaid [a certain amount]. We are required to recover this amount.

47. The Tribunal has sighted evidence that the sponsor agreed to re-pay the funds by way of [amount] per fortnight. While the Tribunal is unaware as to the reasons behind this failure to disclose the change of status by the sponsor, the Tribunal is satisfied that the relationship has been recognised by Centrelink since April 2015, which coincidentally aligns to when the parties registered their relationship.

48. The nature of the commitment to one another

49. The Tribunal places significant weight on the length of time the parties have lived together and the companionship and emotional support they draw from each other. The Tribunal is also satisfied that the relationship is seen by both parties as being long-term.

50. The Tribunal places weight in the applicant's favour on the fact that he has, and could have had, a migration pathway independent of the sponsor. The parties were cogent in their arguments that if the applicant's only interest was gaining permanent residency, the strength of his qualifications would have permitted him to remain in Australia at any time prior to applying for this Partner visa. The Tribunal has sighted the evidence which demonstrates that after waiting for such a lengthy period for the Partner visa to be resolved, the applicant has submitted an application for a [temporary] visa which is being processed. The parties stated that they wanted to file a Partner visa when they did to reflect their commitment to one another.

51. The Tribunal also places significant weight on a letter from a Senior Specialist, [Ms D], at the [named] Hospital, dated 5 December 2018 stating that the sponsor had been a patient for over [years] and that she saw him every 4 months to manage his multiple medical conditions. She also wrote:

52. Mr [A] and Mr [E] have been partners for over [years], since the middle of 2013 and have been co-habiting since 2013.

53. Since Mr [E] has been in a relationship with my patient I have seen tremendous improvement in the health of my patient, Mr [A]. In particular I have seen much greater control of Mr [A]'s [medical condition 3] because Mr [E] has greatly improved the quality of the household meals and has been involved in improving Mr [A]'s adherence to his [medications]. Furthermore Mr [A] is now exercising much

more than previously. I do not think that any of these improved medical outcomes would have occurred without the help of his partner, Mr [E]. Indeed, recently Mr [A]'s [medical condition 4] has become normal for the first time in several years purely due to his improved [medical condition] control, increased exercising and dietary changes.

54. The other factor that I believe has noticeably improved is Mr [A]'s levels of [medical condition 2] and [medical condition 5]. He has struggled with these two [health] problems since I have known him and they have been fairly refractory to medications and [other treatment]. However I believe that the quality of his relationship with Mr [E] has led to this highly welcome improvement in Mr [A]'s [health].

55. I would like to note that when Mr [E] was overseas in October and November 2018 that Mr [A] had a severe relapse of [medical condition 2] which led to decreased medication adherence and he became very socially isolated. Upon Mr [E]'s return, there has been considerable improvement in my patient's [health].

56. Mr [E] assiduously attends Mr [A]'s medical appointments with me and provides very important feedback and input into how Mr [A]'s health and well being has been between his medical appointments...

57. The letter of support is consistent with the evidence provided overall that the parties have a mutual commitment to one another that is exclusive of others, and that they provide one another with companionship and support in everyday life.
58. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.
59. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

Are the additional criteria for a de facto relationship met?

60. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
61. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
62. The parties have provided consistent evidence that their relationship started as a de facto couple [in] September 2013. This application was lodged on 27 February 2015. Therefore it meets the 12 month requirement. In any event, the parties have provided evidence that the relationship is registered under [the law], as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
63. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

64. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

65. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations;
 - r.2.03A

Rosa Gagliardi
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.
- Note 1* See regulation 2.03A for the prescribed criteria applicable to de facto partners.
- Note 2* The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person. Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.
- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and

- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).